

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

VAN WELL NURSERY, INC., a
Washington Corp., HILLTOP
FRUIT TREES, LLC,

NO. CV-04-0245-LRS

Plaintiffs,

**ORDER DENYING MOTION FOR
RECONSIDERATION**

v.

MONY LIFE INSURANCE COMPANY,
a New York corporation; A/B
HOP FARMS, INC., a Washington
corporation; BENNETT G.
BRULOTTE and TRACY A
BRULOTTE, individually and
their marital community;
WALLA WALLA PARCEL NO. 31-07-
23-11-00-02

Defendants.

MONY LIFE INS. CO., a N.Y.
corp.,

Third-Party Plaintiff,

NATIONAL LICENSING ASSOC.,
LLC., a Washington limited
liability company (f/k/a
Nursery Licensing
Association, LLC),

Third-Party Defendant.

1 **BEFORE THE COURT** is a motion for partial reconsideration of this
 2 Court's January 24, 2005 order, filed December 1, 2006 by Hilltop
 3 Fruit Trees, Hilltop Nurseries, and Van Well Nurseries. (Ct. Rec.
 4 150).

5 **I. BACKGROUND**

6 On July 9, 2004, plaintiffs filed this action for plant patent
 7 and trademark infringement, as well as false designation of origin,
 8 counterfeiting, unfair competition, and Washington Consumer Protection
 9 Act claims. On September 23, 2004, Mony Life answered the complaint
 10 asserting various defenses, affirmative defenses, counterclaims, and a
 11 third party complaint against National Licensing Association (NLA).
 12 On January 24, 2005, the plaintiff's patent infringement claims
 13 asserted against Mony Life were dismissed by entry of summary
 14 judgment. Specifically, the nurseries and NLA are asking this Court
 15 to reconsider the following language from the January 24, 2005 order:

16 C. Validity of Mony Life's Lien Interest

17 Finally, in and (sic) effort to save its claim in response
 18 to Mony Life's cross motion for summary judgment, Van Well
 19 requests this Court declare that Mony Life never held a
 20 valid lien interest in any of the allegedly infringing
 21 trees. It requests Mony's lien interests be voided and the
 22 infringing trees ordered destroyed. Relying primarily upon
 23 law derived from copyright cases, Mony Life argues that
 24 Mony's state lien rights are void as conflicting against
 federal intellectual property law. Van Well's request has
 no support in the law of patents and as pointed out by Mony
 Court declines to expand patent law in the manner that Van
 Well requests." (Ct. Rec. 52 at 15).

1 On February 5, 2007, during the pendency of this motion,
2 plaintiffs Van Well Nursery, Inc., and Hilltop Fruit Trees, LLC
3 ("Nurseries") and defendant MONY Life Insurance Co. entered a
4 stipulation pursuant to Fed. R. Civ. P. 41(a)(2) that the claims and
5 counter-claims asserted against each other in the above-entitled
6 matter be dismissed with prejudice and without attorneys' fees or
7 costs to any party. Ct. Rec. 174. The stipulation has been entered
8 by the Court. (Ct. Rec. 182).

9

10 **II. DISCUSSION**

11 The Federal Rules of Civil Procedure do not expressly allow for
12 motions for reconsideration. Nevertheless, a motion for
13 reconsideration of judgment may be brought under either Rule 59(e) or
14 Rule 60(b). *See Hinton v. Pacific Enter.*, 5 F.3d 391, 395 (9th Cir.
15 1993) (motion for reconsideration of summary judgment is appropriately
16 brought under either rule). When a motion for reconsideration does
17 not identify the Rule under which it was filed, courts in the Ninth
18 Circuit construe it as filed under Rule 59(e) if it was filed within
19 ten days of the filing of the judgment. *Shapiro v. Paradise Valley*
20 *Unified Sch. Dist. No. 69*, 374 F.3d 857, 863 (9th Cir. 2004); *Am.*
21 *Ironworks & Erectors Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 898-99
22 (9th Cir. 2001). The courts also provide for motions for
23 reconsideration before the entry of a judgment adjudicating all of the
24 claims and the rights and liabilities of all the parties in a case.
25 *U.S. v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (1970). Because

1 this motion was filed nearly two years since this Court's January 24,
2 2005 order, the motion for reconsideration fits within the second
3 category.

4 Motions for reconsideration offer an 'extraordinary remedy, to
5 be used sparingly in the interests of finality and conservation of
6 judicial resources.'" *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir.
7 2003). Mony Life argues that this motion for reconsideration is
8 untimely because it was filed nearly two years after the Court's
9 order. (Ct. Rec. 158 at 3.) The Court notes that a motion for
10 reconsideration can be brought before the entry of judgment
11 adjudicating all of the claims in a case. However, without
12 considering the timeliness of the motion, the Nurseries' motion for
13 reconsideration fails.

15 **A. Standard for Reconsideration**

16 Absent exceptional circumstances, only three types of arguments
17 provide an appropriate basis for a motion for reconsideration:
18 arguments based on newly discovered evidence, arguments that the court
19 has committed clear error, and arguments based on "an intervening
20 change in the controlling law." *89 Orange St. Partners v. Arnold*, 179
21 F.3d 656, 665 (9th Cir. 1999).

22 The Nurseries have failed in their briefing to demonstrate that
23 the Court committed clear error or that there is an intervening change

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1 in the law.¹ Moreover, the nurseries arguably seek not a
2 reconsideration, but instead an advisory opinion. As the defendants
3 properly argue, in the present litigation, all of the Nurseries'
4 claims have been settled/dismissed. (Ct. Rec. 182.) The portion of
5 the order which the nurseries ask the Court to reconsider dealt
6 primarily with Van Well, which has settled.

7 **B. Advisory Opinions**

8 For all practical purposes, the Nurseries are no longer part of
9 the litigation currently before the Court. In essence, they together
10 with NLA seek an advisory opinion that asks this judicial officer to
11 speculate on facts not before this Court, but which may come before a
12 different court at another time. Advisory opinions are generally
13 disfavored. *Steel Co v. Citizens for a Better Environment*, 523 U.S.
14 83, 122(1998) (Stevens' concurring opinion).

16 For the reasons stated above, **IT IS HEREBY ORDERED** that the
17 Nurseries' Motion for Reconsideration (Ct. Rec. 150) is **DENIED**.

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22 ¹Plaintiffs do not suggest that the Court's summary of their
23 contentions contained in the January 24, 2005 order (Ct. Rec. 52) were
24 incorrect. Plaintiffs and the third party defendant by their arguments
25 at that time in essence invited the Court to speak to the priority issue
26 which had been raised.

IT IS SO ORDERED. The District Court executive is directed to enter this order and provide copies to counsel.

DATED this 8th day of March, 2007.

s/Lonny R. Suko

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE